

AMERICAN ARBITRATION ASSOCIATION
230 SOUTH BROAD STREET, 12TH FLOOR
PHILADELPHIA, PA 19102-4106

Case No. 14 390 00617 11

In the Matter of Arbitration Between

CITY OF PHILADELPHIA :

Employer :

and :

OPINION

:

AND

FRATERNAL ORDER OF POLICE
LODGE NO. 5 :

AWARD

Union :

ARBITRATOR: Robert E. Light, mutually chosen
by the parties pursuant to the rules
and regulations of the American
Arbitration Association.

HEARINGS: November 2, 2011 and April 30, 2012
in Philadelphia, Pennsylvania.

APPEARANCES: For the City
Shant Zakarian, Esq.
Captain Gregory Malkowski, Commanding Officer

For the Union
Marc Gelman, Esq. (Jennings Sigmond)
Matthew Hill, Grievant
John McGrody, Union Representative

ISSUE: Was there just cause for the termination of
Matthew Hill? If not, what shall be the remedy?

BACKGROUND

Hearings in this matter were held in the offices of the American Arbitration Association located in Philadelphia, Pennsylvania on November 2, 2011 and April 30, 2012 with both sides present and duly represented by counsel and with both sides having full and complete opportunity to offer evidence and argument in support of their respective contentions. As arranged at the hearing, subsequent to its completion, both counsel filed post-hearing briefs, after which time the hearing was declared closed.

The City of Philadelphia (hereinafter the City or the Employer) and the Fraternal Order of Police, Lodge No. 5 (hereinafter the Union) are signatories to a current collective bargaining agreement. A grievance was filed by the Union on behalf of its member Matthew Hill protesting a Notice of Dismissal which was effective March 14, 2011 (Joint Exhibit No. 1). The grievance was filed by the FOP protesting the termination which alleged violations of Philadelphia Police Department's Disciplinary Code at Sections 1.75 (Conduct Unbecoming an Officer) and 5.18 (Improper Use, Handling or Display of Firearms). The matter proceeded through the course of the grievance procedure and when there was no resolution it was submitted to the undersigned who was mutually designated by the parties pursuant to the rules and regulations of the American Arbitration Association.

THE FACTS

Matthew Hill was first hired as a Police Officer in the City of Philadelphia in April, 2003 and was assigned to the 26th District. He was terminated from his employment with the City effective March 14, 2011 for, as is set forth in the Notice of Dismissal, "Conduct Unbecoming an Officer", Section 1.75. (Joint Exhibit No. 1). In

that Notice of Dismissal it indicates that the termination was for “repeated violations of Departmental Rules and Regulation, and/or any other course of conduct indicating that a member has little or no regard for his/her responsibility as a member of the Police Department” (Joint Exhibit No. 1). While the termination took place in March, 2011, the facts giving rise to the termination occurred in December 2007 and February 2008 (two incidents). All of the incidents involved events occurring while Officer Hill was off duty.

From the facts adduced at the hearing, it appears that the grievant had a romantic relationship with a woman named C [REDACTED] H [REDACTED], which relationship began on or about May, 2006. To state that it was a “volatile relationship” would be stating the obvious. Both the grievant and Ms. H [REDACTED] testified at the hearings.

While there was some discrepancy with respect to the dates of the incidents involved here, it appears that there were three incidents occurring in the years of 2007 and 2008 which ultimately led to the grievant’s termination. At the hearing, both Officer Hill and Ms. H [REDACTED] testified with respect to their recollection of what occurred.

The first incident involved a situation where, according to Ms. H [REDACTED] the grievant put a gun to his head in the shower and put a gun to his chest indicating that he was going to kill himself; another incident, as testified to by Ms. H [REDACTED], occurred in January 2008 where Ms. H [REDACTED] testified that the grievant called her mother alleging that Ms. H [REDACTED] was driving while intoxicated and that, according to the grievant, Ms. H [REDACTED] threw a cologne bottle at him, striking him in the head. Apparently Officer Hill had a cut on his head. Another incident occurring in February 2008 involved, according to Ms. H [REDACTED], the grievant hanging himself with a belt in the garage attempting to kill himself. Ms. H [REDACTED] testified that the grievant hit her [REDACTED]

██████████ Ms. H ██████ testified that the grievant, over several incidents in general, struck her on a number of occasions and in addition, exhibited a bizarre behavior respecting attempts to commit suicide and the like.

Officer Hill testified in his own behalf at the hearing. He stated that he and Ms. H ██████ began dating in 2006 and he tried to end the relationship sometime in November 2007. He stated that on January 12, 2008 Ms. H ██████ came to his home in a drunk state and hit him with a cologne bottle and that she was yelling and screaming. In short, his testimony differed substantially with respect to what occurred on that day and, in general, the testimony of Ms. H ██████ and the grievant differed with respect to what occurred on each of the incidents in question. While the grievant acknowledged that he had some problems, he stated that he is seeing a psychiatrist, had been upset and depressed and over the period of time when these events occurred, and that he simply tried to end the relationship with Ms. H ██████ but she was unwilling to do so. Further, he stated that all of the events in question occurred at his apartment, and that he never hit her but did acknowledge that he did physically remove her from his home.

POSITION OF THE CITY

The City takes the position that the termination should be sustained here in that the grievant was charged with Conduct Unbecoming and Officer as well as Disobedience of Orders. While it acknowledges that all of the events in question occurred while the grievant was not on duty, it nevertheless maintains that both arbitrators and the courts have tended to protect the governments employer's reputation and mission, citing the public trust. In support of its position, the City cites court cases respecting disciplining an employee for off-duty misconduct where there is a connection between the off-duty

misconduct and the employer's interest. It maintains that off-duty conduct is relevant when the conduct relates to and harms the employer's business. (City Brief Page 6). It argues that there is a legitimate nexus between the grievant using excessive force in his personal life to deal with social situations and his conduct at work. (City Brief Page 7). It points out to the arbitrator that the grievant struck a female, took pictures of himself with a gun pointed at his body and tampered with a witness during his disciplinary hearing. It maintains that the grievant is not psychologically sound and can not perform police work, which is inherently stressful. (City Brief Page 7). It asks that the grievance be denied and that the grievant's discharge be sustained.

POSITION OF THE FOP

The FOP takes the position that the grievance should be sustained and that Officer Hill should be reinstated to his position as a Police Officer with full seniority and benefits, that he be made fully and completely whole for all of his losses and that his record be fully expunged with any reference to this discipline. (FOP Brief Page 11). It further requests that the arbitrator retain jurisdiction to address any issues concerning remedy. The FOP maintains that the City has not met its burden of proof in showing that Hill assaulted H [REDACTED] (FOP Brief Page 6). It cites the testimony of Lieutenant C [REDACTED] who testified that after a thorough physical examination of Ms. H [REDACTED] on the evening in question he did not observe any physical signs of a struggle or an assault. (FOP Brief Page 7). Further, it cites the credibility issues present here as between Ms. H [REDACTED] and Officer Hill. It cites the Internal Affairs investigator's comment that he believed that, as respect to the cologne bottle incident, that Ms. H [REDACTED] either lied to the police or intentionally misrepresented.

The FOP counsel cites the fact that all of the incidents here occurred while Officer Hill was off-duty and there is no factual nexus between the conduct and the performance of his job. (FOP Brief Page 9). No criminal charges were brought against either party and no crime was committed. Finally, the FOP argues that, notwithstanding that the events in question occurred in early 2008, no discipline was taken until March 14, 2011 when the City issued a Notice of Dismissal. (FOP Brief Page 10). It requests that the grievance be upheld in its entirety.

DISCUSSION

The arbitrator has carefully weighed all of the evidence in the case including the testimony of the witnesses at the hearings, the arguments of respective counsel as set forth both at the hearings and in their post-hearing briefs, the contract and the exhibits prior to reaching his decision.

Initially, the arbitrator notes that, as a general proposition, arbitrators subscribe to the view that an employer can not discharge or discipline an employee for acts committed when the employee is off-duty. As one arbitrator said, "management has no authority to punish every act of immoral conduct in the community, merely because an employee is involved." Be that as it may, employers may still discharge an employee for off-duty conduct and make it stick, given the particular facts and circumstances of each case. Generally, in exercising this right to discharge or discipline an employee, the employer must prove that there is some injury to the employer's business or retention of the employee in the employer's employ will have the effect of disrupting the employer/employee relationship. Some of the factors looked at are the nature of the crime or acts committed and the degree to which the crime or acts were publicized. Of

course, in the view of this arbitrator, when law enforcement is involved, employees are held to a higher duty respecting off-duty conduct.

As noted, this case presents classic credibility issues. Assessing credibility is no easy task for Arbitrators to perform and where, as here, portions of the testimony are in such direct conflict that task becomes all the more difficult. However, of necessity, credibility findings have had to be made so that the Arbitrator utilized those kinds of tests in order to ascertain credibility namely, the demeanor of the witnesses as they testified, the reasonableness of the stories that were told, the existence of conflicts with other assertions of fact, and the simple plausibility of the grievant's story when weighed against ordinary experience and common sense. In evaluating a witness's credibility, arbitrators look at the following factors:

- 1) Interest or lack of interest in the outcome of the case.
- 2) The relationship to the party;
- 3) The ability and opportunity to know, remember, and relay the facts;
- 4) The manner and appearance
- 5) The age and experience
- 6) The frankness and sincerity, or lack thereof;
- 7) The reasonableness or unreasonableness of the testimony in light of all the other evidence in the case
- 8) Any impeachment of the testimony, and
- 9) Any other factors that bear on believability and weight.

To be sure, this arbitrator can not condone the grievant's actions, in general, respecting

his relationship with Ms. H [REDACTED]. While that may be so, the arbitrator must also take into account the testimony of Ms. H [REDACTED] which was somewhat inconsistent respecting some of the incidents that allegedly occurred. Aside from the facts here, what is particularly troublesome to this arbitrator is the lengthy delay between when these events occurred and when the City took action namely, approximately three years after the events in question. Put another way, as was properly noted by FOP counsel, Officer Hill was free to perform all of the duties of a Police Officer for approximately three years before the City decided that discharge was the appropriate remedy. The query is then properly raised: if an employee's off-duty conduct is serious enough that the existence thereof may jeopardize his very employment, how can the City properly justify a three year delay in imposing such discipline? While the arbitrator realizes that sometimes justice moves slowly, in his view, this is an unreasonable delay.

Based upon all the facts and evidence in this case, the arbitrator cannot be unmindful of how the grievant proceeded here and how his "problems" spilled into the work place and clearly would impact negatively his employment performance. By the same token however, as noted, there are mitigating circumstances present here, not the least of which as noted above, the delay in this matter proceeding to finality. How then to resolve this matter? Hearing all of the facts and circumstances of this case, the arbitrator is inclined to reinstate Officer Hill to his prior position with the City but on certain terms and conditions. Firstly, the officer would have to pass a return to work physical examination conducted by a physician of the City's choosing, who would clear the grievant for work both mentally and physically. Next, for a period of one year, the grievant would undergo quarterly physical and psychological evaluations by a doctor

who would certify that the grievant is able to function appropriately in his job. Finally, given the facts and circumstance of this case, the arbitrator is returning the grievant to work but without any back pay entitlement.

Therefore, the undersigned having duly heard all of the proofs and allegations of the parties in this proceeding makes the following:

There was not just cause for the termination of Matthew Hill. He shall be reinstated to his prior position with the City consistent with the comments made in the within Opinion. The Arbitrator retains jurisdiction to address any issues concerning the remedy.

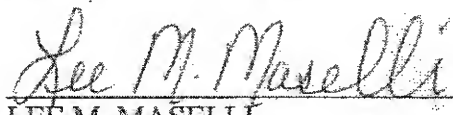

ROBERT E. LIGHT ARBITRATOR

State of New Jersey:

ss

County of Somerset:

On this 19th day of July 2012 before me personally came and appeared ROBERT E. LIGHT known to me to be the individual described in and who executed the foregoing instrument and acknowledged to me that he executed the same.


LEE M. MASELLI
NOTARY PUBLIC STATE OF NEW JERSEY
MY COMMISSION EXPIRES MARCH 3, 2015